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Further Impact on Swiss Financial Centre as New Consultations on the International Exchange of Information are initiated

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Abstract

In January 2015, the Swiss Government launched two consultations on the international exchange of information in tax matters in order to ensure the automatic exchange of information. One proposal concerns the OECD/Council of Europe administrative assistance convention. The other proposal concerns the Swiss participation in the MCAA and the AEOI implementing act. The traditional Swiss banking is directly affected.

Introduction

The days of the classic Swiss bank secrecy seem to be numbered. Ever since the Swiss Government announced on March 13, 2009 that it will withdraw its reservation regarding OECD Model Tax Convention art.26 and, hence, provide administrative assistance in tax matters, various steps have been taken in order to adapt the Swiss financial industry to the new framework.¹ The measures taken resulted in the fact that Bank clients may no longer protect their privacy in financial matters behind the Swiss bank secrecy.

As part of the international developments and ongoing pressures, in February 2012, the Swiss Government consequently approved a strategy for a tax-compliant and competitive Swiss financial centre, the so-called financial centre strategy.² It included two steps:

- the assets from existing clients should be regularised from a tax perspective; and

- the international co-operation and the future taxation of capital gains and investment income should be adjusted.³

Subsequently, in December 2012, the Swiss Government further specified its financial centre strategy:

- the competitiveness was meant to be strengthened;
- financial crime and investment of untaxed assets should be combated more intensively;
- international withholding tax agreements should be concluded with more countries; and
- standard-compliant administrative and mutual assistance should be adopted.⁴

“Clean money” (*Weissgeld*) was declared the new mantra and “dirty money” (*Schwarzgeld*) should henceforth be a predicate offence for money laundering in accordance with the recommendations of the Financial Action Task Force (“FATF”).⁵

Whereas, on the national level, the consequent adoption of international standards since 2009 led to various proposals in order to revamp the financial market legislation,⁶ on the international level, there was still a long way to accomplish the Swiss Government’s goal of full compliance, although many steps have already been taken or at least initiated ever since. In January 2015, the Swiss Government launched two far-reaching consultations on the international exchange of information in tax matters in order to ensure the automatic exchange of information.⁷ One legislative proposal concerns the OECD/Council of Europe administrative assistance convention already signed by Switzerland in 2013. The other proposal concerns the Swiss participation in the Multilateral Competent Authority Agreement and the Automatic Exchange of Information (“AEOI”) implementing act.⁸

While these most recent proposals shall be at the heart of this article, a minor retrospect on the recent attempts to implement the international standard may prove helpful in order to perceive the full impact of the reforms.

Retrospect on the recent implementation of international standards

The implementation of the international standards occurs continuously within the reform of already existing double tax treaties, through signing of new treaties or the

¹ Federal Department of Finance (“FD”) at <http://www.efd.admin.ch/dokumentation/medieninformationen/00467/index.html?lang=en&msg-id=25863> [Accessed February 17, 2015].

² State Secretariat for International Financial Matters (“SIF”) at http://www.sif.admin.ch/00754/index.html?lang=en&print_style=yes [Accessed February 17, 2015].

³ State Secretariat for International Financial Matters (“SIF”).

⁴ State Secretariat for International Financial Matters (“SIF”) at <http://www.sif.admin.ch/themen/00827/index.html?lang=en> [Accessed February 17, 2015].

⁵ P. Nobel, “Entwicklungen im Bank- und Kapitalmarktrecht” in *Schweizerische Juristen-Zeitung* SJZ 109 (2013) p.11.

⁶ P. Nobel, “Entwicklungen im Bank- und Kapitalmarktrecht” in *Schweizerische Juristen-Zeitung* SJZ 111 (2015) p.11.

⁷ State Secretariat for International Financial Matters (“SIF”) at <https://www.sif.admin.ch/sif/en/home/dokumentation/medienmitteilungen/medienmitteilungen.msg-id-55889.html> [Accessed February 17, 2015].

⁸ State Secretariat for International Financial Matters (“SIF”).

conclusion of Tax Information Exchange Agreements (“TIEA”).⁹ Three major recent projects already paved the way for the proposals presented by the Swiss Government in January 2015.

Implementation of the FATF recommendations

Based on the FATF recommendations, which were fundamentally reviewed between 2009 and 2012,¹⁰ and in order to fix some overdue shortcomings as stated during the FATF’s evaluation of Switzerland back in 2005, the Swiss Government initiated consultation procedures on a preliminary bill for a new Federal Act for Implementing the Revised Financial Action Task Force (“FATF”) Recommendations already in 2013.¹¹ The Swiss Government then adopted the proposal for the Federal Act for Implementing the Revised Financial Action Task Force (“FATF”) Recommendations, together with the respective dispatch on the implementation of the Act.¹² The proposal took into account the results of the consultation procedure. The final bill was centred on three topics: transparency regarding bearer shares, introduction of predicate offences in the tax area, and the money laundering reporting system for suspicious activities. This proposal is currently subject to deliberations in Parliament.¹³

Revision of the Tax Administrative Assistance Act

Due to a recommendation made by the global Forum on Transparency and Exchange of Information for Tax Purposes, a further revision of the recently amended Swiss Tax Administrative Assistance Act (“TAAA”; in force since February 1, 2013) was required, which then entered into force as of August 1, 2014.¹⁴ Three main amendments have been introduced into the TAAA: According to the new art.6 para.2bis of the TAAA, the Swiss Government shall determine the required content of group requests. Furthermore, a new art.14a of the TAAA has been introduced setting for a special procedure for group requests, given that it is difficult to reach the concerned persons in order to notify the final decision to them. The Federal Tax Administration (“FTA”) does only need to inform the concerned persons about the relevant parts of the request. Finally, the new art.21a of the TAAA provides for a new procedure with deferred notification of persons entitled to appeal. According to TAAA art.21a para.1, the FTA shall exceptionally notify persons entitled to appeal about a request by means of a decree only after

the information has been transmitted if the requesting authority demonstrates that the purpose of the administrative assistance would be defeated and the success of its investigation would be thwarted by prior notification. TAAA art.6 para.2bis and art.14a apply to group requests submitted after February 1, 2013, whereby TAAA art.21a and the other articles which have been amended accordingly apply to administrative assistance requests already submitted on or after August 1, 2014.

Unilateral application of OECD Standard on Exchange of Information upon request

In October 2014, the Swiss Government proposed a Federal Act on the Unilateral Application of the OECD Standard on the Exchange of Information (“GASI”) and initiated the respective consultation procedure.¹⁵ This legislative proposal shall allow Switzerland to amend those double taxation agreements more swiftly, which do not yet comply with the international standard for the exchange of information upon request. The Government claimed that other states like Belgium and Singapore had already introduced unilateral measures to bring their network of double tax treaties into line with the respective recommendations of the Global Forum on Transparency and Exchange of Information for Tax Purposes.¹⁶

This legislative proposal constituted another effort by the Swiss Government to implement said recommendation in order to create a dense network of information exchange agreements. Among others, these efforts include the bilateral renegotiation of existing treaties and the conclusion of new ones, including tax information exchange agreements (“TIEA”). Together with the signing of the multilateral OECD/Council of Europe Convention on Mutual Administrative Assistance in Tax Matters (see below) these measures are part of the Government’s strategy for a competitive and tax-compliant financial centre, which is in line with international standards.¹⁷

The unilateral application shall, however, only occur in compliance with the principles of reciprocity and confidentiality of the exchanged information. This means that Switzerland shall continue to refrain from responding to requests if the requesting state is not in a position to respond to requests from Switzerland in line with the OECD standard and is unable to comply with the data protection rules and the so-called principle of speciality. This mechanism is meant to be an interim measure. As soon as states or territories are able to exchange information upon request with Switzerland on the basis of a double tax treaty according to the OECD standard or any other international agreement, GASI will no longer

⁹ P. Nobel, “Entwicklungen im Bank- und Kapitalmarktrecht” in *Schweizerische Juristen-Zeitung* SJZ 111 (2015) p.13.

¹⁰ See <http://www.fatf-gafi.org/topics/fatfrecommendations/documents/internationalstandardscombatingmoneylaunderingandthefinancingofterrorismproliferation-thefatfrecommendations.html> [Accessed February 17, 2015].

¹¹ P. Nobel, “Entwicklungen im Bank- und Kapitalmarktrecht” in *Schweizerische Juristen-Zeitung* SJZ 110 (2014) p.12/14; State Secretariat for International Financial matter (“SIF”) at <http://www.sjf.admin.ch/dokumentation/00509/00510/00622/00624/00868/index.html?lang=en> [Accessed February 17, 2015].

¹² State Secretariat for International Financial Matters (“SIF”).

¹³ P. Nobel, “Entwicklungen im Bank- und Kapitalmarktrecht” in *Schweizerische Juristen-Zeitung* SJZ 111 (2015) p.13.

¹⁴ P. Nobel, “Entwicklungen im Bank- und Kapitalmarktrecht” in *Schweizerische Juristen-Zeitung* SJZ 111 (2015) p.13.

¹⁵ Federal Department of Finance (“FDF”) at <https://www.news.admin.ch/message/index.html?lang=en&msg-id=54902> [Accessed February 17, 2015].

¹⁶ Federal Department of Finance (“FDF”).

¹⁷ Federal Department of Finance (“FDF”).

be applicable to the states or territories concerned. It shall be repealed as soon as all of the states and territories concerned are covered by an agreement which makes provision for the international standard recognised by the OECD. The unilateral application only refers to the exchange of information upon request and does not make any provision as regards the spontaneous or automatic exchange of information.¹⁸ The consultation procedure regarding the Federal Act on the Unilateral Application of the OECD Standard on the Exchange of Information ("GASI") ended on February 5, 2015.

Consultations on international exchange of information

In July 2014, the OCED published the new global Standard for Automatic Exchange of Financial Account Information.¹⁹ Given that the Swiss Government always aimed for global uniform standards, in order to provide for equal opportunities as regards the competition of the leading financial centres, it adopted respective negotiation mandates with partner states in October 2014.²⁰

In November 2014, the Swiss Government also approved a declaration on Switzerland joining the Multilateral Competent Authority Agreement on the Automatic Exchange of Financial Account Information ("MCAA"), which was developed within the OECD and which should pave the way for the introduction of the cross-border automatic exchange of information. The Swiss Government intends to collect data from 2017 and to exchange the respective information from 2018 onwards.²¹

In January 2015, finally, the Swiss Government launched the consultations in order to enhance the automatic exchange of information ("AEOI"). One legislative proposal concerned the OECD/Council of Europe Administrative Assistance Convention and the other proposal related to Switzerland's participation in the MCAA and the AEOI implementing act. The Government pointed out that the related matter of the states, with which Switzerland should establish the automatic exchange of information, shall be presented to the legislator at a later stage.²²

OECD/Council of Europe Administrative Assistance Convention

The Swiss Government signed the OECD/Council of Europe Convention on Mutual Administrative Assistance in Tax Matters (also Administrative Assistance Convention) on October 15, 2013. This convention contains the substantive legal basis for administrative assistance between Switzerland and any other contracting party.²³ The OECD/Council of Europe Convention on Mutual Administrative Assistance in Tax Matters provides for three forms of information exchange: upon request, spontaneous and automatic. The exchange of information upon request corresponds to the OECD standard adopted by Switzerland in 2009 as provided in art.26 of said standard, which has ever since been foreseen in various double taxation treaties and tax information exchange agreements. Joining this convention enables Switzerland, according to the Swiss Government, to increase the number of states with which it can exchange information upon request in a standard-compliant manner. Also, the spontaneous exchange of information is introduced with the Administrative Assistance Convention. Thereby, data is not transmitted following a prior request, but rather already when the transmitting state suspects another state's possible interest in information it already has.²⁴ The Administrative Assistance Convention also represents the basis for the introduction of the automatic exchange of information.

Besides the mere exchange of information, the OECD/Council of Europe Convention on Mutual Administrative Assistance in Tax Matters also provides for other forms of administrative assistance, such as assistance in enforcement and administrative assistance for the service of documents.²⁵ The Swiss Government, therefore, proposed to exclude these other forms by making one of the reservations registered as options in the convention itself. Only direct postal delivery shall be allowed for the service of foreign authorities' documents in Switzerland and, conversely, for the service of Swiss authorities' documents abroad. Finally, by making another reservation, the applicability of the Administrative Assistance Convention for tax offences committed intentionally and subject to criminal sanctions shall be limited to a time period following the signature of the convention by Switzerland in 2013.²⁶

¹⁸ Federal Department of Finance ("FDP").

¹⁹ P. Nobel, "Entwicklungen im Bank- und Kapitalmarktrecht" in *Schweizerische Juristen-Zeitung* SJZ 111 (2015) p.14: OECD at <http://www.oecd.org/ctp/exchange-of-tax-information/automatic-exchange-financial-account-information-common-reporting-standard.pdf> [Accessed February 17, 2015]; State Secretariat for International Financial Matters ("SIF"), *Documentation: Implementation of the global standard for the automatic exchange of information in tax matters internationally*, January 14, 2015.

²⁰ State Secretariat for International Financial Matters ("SIF") at <https://www.sif.admin.ch/sif/en/home/dokumentation/medienmitteilungen/medienmitteilungen.msg-id-54768.html> [Accessed February 17, 2015].

²¹ State Secretariat for International Financial Matters ("SIF").

²² State Secretariat for International Financial Matters ("SIF").

²³ State Secretariat for International Financial Matters ("SIF") at <https://www.sif.admin.ch/sif/en/home/dokumentation/medienmitteilungen/medienmitteilungen.msg-id-55889.html> [Accessed February 17, 2015].

²⁴ State Secretariat for International Financial Matters ("SIF"), *Documentation: Implementation of the global standard for the automatic exchange of information in tax matters internationally*, January 14, 2015.

²⁵ State Secretariat for International Financial Matters ("SIF") at <https://www.sif.admin.ch/sif/en/home/dokumentation/medienmitteilungen/medienmitteilungen.msg-id-55889.html> [Accessed February 17, 2015].

²⁶ State Secretariat for International Financial Matters ("SIF").

The Swiss Government then also suggested making two declarations. The first declaration should state that Switzerland will generally inform affected persons about the forthcoming exchange of information and the second that Switzerland will not accept any foreign authority's request to conduct on-site tax audits in Switzerland.²⁷

Multilateral Competent Authority Agreement on the Automatic Exchange of Financial Account Information and Federal Act on the international automatic exchange of information in tax matters

Switzerland signed the Multilateral Competent Authority Agreement on the Automatic Exchange of Financial Account Information ("MCAA") on November 19, 2014. The MCAA is based on the idea of a uniform implementation of the OECD's automatic exchange of information standard, which has always been a fundamental pillar of the Swiss Government's strategy. The MCAA is based on art.6 of the OECD/Council of Europe Convention on Mutual Administrative Assistance in Tax Matters which has been submitted for in parallel. The MCAA provides for the exchange of information collected in accordance with the provisions of the automatic exchange of information standard developed by the OECD together with the G20 members (so-called common reporting standard or "CRS"). As regards the content, the common reporting standard sets out who has the burden to collect which information on which accounts.²⁸

Since not all provisions of the MCAA and of the common reporting standards are sufficiently detailed, justiciable and, therefore, directly applicable, the enactment of an accompanying federal law is deemed necessary in order to have them duly implemented.²⁹ The Federal Act on the International Automatic Exchange of Information in Tax Matters ("AEOI Act"), according to its art.1, governs the implementation of the AEOI standard by way of the MCAA (lit.a.) and through other international conventions foreseeing an automatic exchange of information on bank accounts (lit.b.). Thereby, the Swiss Government bundles the two models foreseen for the automatic exchange of information into one act. While no further treaties are required between the Member States of the MCAA (so-called Model 2), it is expected that (bilateral) treaties may well be concluded between Switzerland and the European Union or the United States (so-called Model 1).³⁰

The AEOI Act also contains the usual provisions on the organisation, the procedure, judicial channels and the applicable criminal provisions. Interestingly, even though

art.3 para.1 lit.c. AEOI Act provides that local banks in which at least 98 per cent of the assets are held by Swiss-based individuals or companies, are exempt from the extensive due diligence for the identification of affected customers, the banks will still have to report any bank account subject to report or, alternatively, close the respective account. Furthermore, AEOI Act art.28 provides that Swiss banks are not allowed to administer or support so-called artificial structures, the exclusive or primary purpose of which is the avoidance of the duties, as foreseen in the MCAA, the AEOI Act or any applicable treaty.

The Swiss Government also suggests that the information automatically received from abroad shall be used for the application and enforcement of Swiss tax law, even though the Swiss tax authorities do, paradoxically, not have access on information regarding bank accounts held in Switzerland, given that this information continues to be protected and is not subject to national exchange of information duties.³¹

The states, with which Switzerland intends to introduce the automatic exchange of information, shall be disclosed at a later stage.³²

Outlook and concluding observations

During the last years, many steps have been taken by the Swiss Government in order to implement all relevant international standards. The ongoing international pressures attempting to end the Swiss bank secrecy seem to succeed. The adaptations reaching as far as allowing the automatic exchange of information shall be implemented in Switzerland—a new reality nobody would have expected 10 or even 5 years ago.

However, despite the drastic adjustments, there still remain some inconsistencies to be solved. One example being that the parallel implementation of both the MCAA and US Foreign Account Tax Compliance Act ("FATCA") may lead to double reporting and, possibly also to double taxation.³³ Further to be considered is, that, even though the Swiss bank secrecy may no longer be an instrument to be misused in order to avoid taxes at the international level due to the implementation of the automatic exchange of information, the Swiss tax authorities may still not retrieve any information on Swiss bank accounts, held by their own countrymen, since the Swiss bank secrecy is currently not being softened on the national level.

While there is no reason to assume that these inconsistencies or particularities may not be solved one way or the other, Swiss banks will have to adapt their structures to these ever changing and evolving legal frameworks piece by piece and redefine their long-lasting

²⁷ State Secretariat for International Financial Matters ("SIF").

²⁸ State Secretariat for International Financial Matters ("SIF").

²⁹ State Secretariat for International Financial Matters ("SIF").

³⁰ Neue Zürcher Zeitung at <http://www.nzz.ch/wirtschaft/bundesrat-setzt-die-vorgaben-zur-steuertransparenz-1.18461029> [Accessed February 17, 2015].

³¹ State Secretariat for International Financial Matter ("SIF"), *Questions and answers on the automatic exchange of information*, January 14, 2015.

³² Neue Zürcher Zeitung at <http://www.nzz.ch/wirtschaft/newsticker/bundesrat-eroeffnet-vernehmlassung-zu-automatischem-informationsaustausch-1.18461218> [Accessed February 17, 2015].

³³ Peter. R. Altenburger, "Coexistence Between FATCA and MCAA—Potential Conflicts" in *Tax Notes International*, January 2015 p.337.

“secret of success”. A challenge which will keep the banking world on its toes with its revised business model

and strategy only to be proven successful in the coming years.